No. 770. 253

Brf. of Walker for D. C. (Motion.)

Office Supreme Court U. S.
FILED
APR 17 1899
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States,

October Term, 1898.

No. 770.

Filed April 17, 1899.

ADA F. McDONNELL, PLAINTIFF IN ERROR,

vs.

LLEWELLYN JORDAN, DEFENDANT IN ERROR.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR ON MOTION FOR WRIT OF CERTIORARI, ON SUGGESTION OF DIMINUTION OF RECORD.

The motion submitted to the court is as follows:

"Comes Llewellyn Jordan, the Defendant in Error in the above entitled cause, by his counsel, Richard W. Walker, and represents and shows unto the court: Final judgment was rendered in said cause on the 8th day of November, 1898, at a regular term of the Circuit Court for the Northern Division of the Northern District of Alabama. The writ of error to review said judgment was sued out and granted on the 15th day of March, 1899, as appears by the transcript of the record filed in this court. Though the right to review said judgment is based solely on the fact that the case is one in which the jurisdiction of the Circuit Court was in issue, the certificate to this court of the questions of jurisdiction

sought to be reviewed was not made by the said Circuit Court during the term at which said judgment was rendered, but was made and signed on the 15th day of March, 1899, at Birmingham, Alabama, by the Honorable John Bruce, the District Judge for the Northern and Middle Districts of Alabama. When said certificate was so made and signed on the 15th day of March, 1899, the Circuit Court of the United States for the Northern Division of the Northern District of Alabama was not in session, and had not been in session since the 9th day of November, 1898. On said 9th day of November, 1898, an order in words as follows was made and entered in said Circuit Court: 'It is ordered by the court that all causes, motions and matters now pending in this court not otherwise disposed of be, and the same are hereby continued to the next term of this court.' The said Hon. John Bruce, who had presided in said Circuit Court at the term at which said judgment was rendered, left the city of Huntsville on said 9th day of November, 1898, and neither he nor any other judge held any session of said court in said Northern Division from that date until the first Monday in April, 1899, when the regular term of said court commenced. From the 6th day of March, 1899, until after the 16th day of March, 1899, the said Hon. John Bruce was holding the regular term of the Circuit and District Courts for the Southern Division of the Northern District of Alabama in the city of Birmingham in said Southern Division. There appears in the transcript of the record in this cause an order, dated March 16th, 1899, signed by said Hon. John Bruce, purporting to finally adjourn said Circuit Court for said Northern Division, but said transcript of said record does not contain the general order of continuance hereinbefore set out. Said Hon. John Bruce was not in the Northern Division of the Northern District of Alabama when said order dated March 16th, 1899, was signed.

The answer of Llewellyn Jordan, which is a part of the transcript of the record of the Probate Court of Madison County, State of Alabama, as the same appears on page 22 of the transcript of the record of the Circuit Court which has been certified to this court, is not a correct copy of said answer as it appears in said original transcript from the

Probate Court on file in the Circuit Court, in that the true date of said answer as it appears in said original transcript is August 4th, 1897, while said date in the transcript sent to this Court is April 4th, 1897. The affidavit of S. S. Pleasants, which is annexed to said answer of Llewellyn Jordan, is incorrectly copied on page 46 of the transcript of the record transmitted to this Court, in that the date on said page 46 is the 4th day of April, 1897, whereas the true date as it appears in said original transcript from said Probate Court, on file in this cause in the Circuit Court, is August 4th, 1897.

On the 8th day of November, 1898, an order was made and entered in this cause by said Circuit Court allowing the plaintiff in error herein ninety days for preparing and having filed a bill of exceptions. By an order made on January 26th, 1899, by the said Hon. John Bruce, at Chambers in the city of Montgomery, Alabama, the time for preparing the bill of exceptions was extended ten days. By an order made by said Hon. John Bruce at Chambers on February 4th, 1899, said time was again extended to February 9th, 1899. By an order made at Chambers by said Judge on February 9th, 1899, said time was again extended to February 16th, 1899. By an order made at Chambers in Montgomery, Alabama, by said Judge, on February 17th, 1899, it was ordered that said time be again extended to March 6th, 1899. None of said orders in reference to a bill of exceptions, though they were duly entered upon the order book of said court, are copied into the transcript of the record transmitted to this Court.

To the end that this Honorable Court may be more fully informed as to whether said certificate of questions of jurisdiction was made by the Circuit Court of the United States for the Northern Division of the Northern District of Alabama, or merely by the Judge who had presided after the term of the court had ended, and to the end that the transcript of the record in this cause in the Circuit Court may be correctly and fully certified to this court, the defendant in error moves the court to order its writ of *certiorari* to issue commanding the Clerk of the Circuit Court for the Northern District of Alabama to certify under the seal of the court any general order of continuance made by said court in the Northern Division of said District on the 9th day of November, 1898;

also all orders made and entered in this cause allowing or extending time for preparing and filing a bill of exceptions; also the answer of Llewellyn Jordan, with the affidavit of S. S. Pleasants filed therewith, with any indorsements or dates thereon, as the same appear in any transcript of record from the Probate Court of Madison County, Alabama, on file in this cause in said Circuit Court; and also whether any session of said Circuit Court for said Northern Division of the Northern District of Alabama was held by any judge, being present and presiding therein, after the 9th day of November, 1898, and before the next regular term of said court. And the defendant in error moves the court to make such other or further order in the premises as the facts may warrant.

RICHARD W. WALKER,
Attorney for Defendant in Error.

STATE OF ALABAMA, }
MADISON COUNTY. }

Richard W. Walker, being duly sworn, says that he is the attorney of record for the defendant in error in the above entitled cause, and that the allegations contained in the foregoing motion are true.

RICHARD W. WALKER.

Subscribed and sworn to before me, this 12th day of April, 1899.

[Seal.] ED. E. GREENLEAF,
U. S. Commissioner.

To Ada F. McDonnell, Plaintiff in Error in the above entitled cause, and Willliam Richardson, Esq., and Lawrence Cooper, Esq., attorneys of record for said Plaintiff in Error in said cause:

Take notice that the foregoing motion will be submitted to the Supreme Court of the United States, on Monday, the 24th day of April, 1899.

RICHARD W. WALKER,
Counsel for Defendant in Error.

Received copy of the foregoing motion and notice, this 12th day of April, 1899.

LAWRENCE COOPER,
WILLIAM RICHARDSON,
Attorneys for Plaintiff in Error."

BRIEF.

The Act of Congress of May 2nd, 1881, (23 Stat. L. 18; 1 Sup. R. S. p. 427) requires the terms of the Circuit and District Courts for the Northern Division of the Northern District of Alabama to be "held therein at the times and place now prescribed by law." The law then in force (1 Supplement to Revised Stat. p. 38) prescribed the city of Huntsville as the place for holding said courts, and fixed the times for holding the regular terms.

To give existence to the court, its officers, and the time and place of holding it must be such as are prescribed by law. When a statute fixes a time and place for a court to sit and exercise its jurisdiction, it cannot lawfully do so at any other time *or place*.

Hobart vs. Hobart, 45 Iowa, 503.
In re Terrill, 52 Kan. 29; 39 Am. St. Rep. 327.
Bacon's Abridgment, tit. "Court", A.
Hawes on Jurisdiction of Courts, sec. 27.
Garlick vs. Dunn, 42 Ala. 404.
Northrup vs. People, 37 N. Y. 205.

The statutes prescribing methods of adjournment in the absence of a judge very clearly imply that a court cannot be a "going concern" without the actual presence of a presiding judge. Rev. Stat. U. S. secs. 671, 672. There is the same implication in the various provisions and rules conferring special powers on judges of courts not in session, and as to matters in reference to which courts are deemed be always open.

The certificate of the question of jurisdiction is an act of the court required to be done during the term.

Colvin vs. Jacksonville, 158 U. S. 456.
Chappell vs. United States, 160 U. S. 507.

The record in this case does not show that the certificate of questions of jurisdiction was made by the court while in session, but the insertion of an order of final adjournment

dated after the certificate was signed is evidently intended as the foundation for an inference by this Court that the Circuit Court was in session until the date of the order for final adjournment. The recital of facts in the motion now made shows that any such inference would be wholly unfounded. The writ of certiorari is properly used to bring up to the court of error outbranches of the record which show material facts more fully than are shown by the record as certified.

United States vs. Adams, 9 Wallace, 661.

The Court should be fully advised of the facts that at the time the certificate of questions of juristiction was signed a general order of continuance of all causes had been entered; that no judge was present and there was no session of the court after the date of that general order of continuance; and that the judge who had presided made several orders extending the time for signing a bill of exceptions, which would not have been made if the term of court had not ended. The recital of facts in the motion shows that at the time Judge Bruce signed the certificate he was holding the regular term of the Circuit and District Courts at Birmingham in the Southern Division of said District. The fact is that at the time the certificate was signed in Birmingham the Circuit Court was not in session at Huntsville. This would affirmatively appear from the return made to the writ of *certiorari* moved for. It is presumed that in reference to a matter so vital to the maintenance of the writ of error as the question whether the term of the Circuit Court had come to an end before the certificate of questions of jurisdiction was signed this court would require that nothing be left to inference which could be made plain by an official certification.

Respectfully submitted,

RICHARD W. WALKER,

Attorney for Defendant in Error.